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Ellen A. Peters: Commercial Transactions: Cases, Text and Problems on Contracts Dealing with Personality, Realty and Services

Edward A. Dauer

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BOOK REVIEW

Commercial Transactions: Cases, Text and Problems on Contracts Dealing with Personalty, Realty and Services. By Ellen Ash Peters.¹ Indianapolis: Bobbs-Merrill. 1971. pp. lix, 1451. \$17.50.

The title alone of Professor Peters' addition to the five-foot shelf of Commercial Law casebooks raises an interesting issue: does the rubric "Commercial Transactions" ideally comprise the bulk of contractual transactions in personalty, realty and services? Beyond the inclusion of a few core topics, there seems to be little professional agreement on exactly what is encompassed, even among those of us who teach the course.² In reviewing these new materials, then, I should like to begin by setting out a few cursory hypotheses concerning the teaching of commercial law, and some notions about what good teaching materials might contain. By applying these as criteria, an evaluation of the suitability of the Peters book will then be essayed.³

I. OBJECTIVES AND MATERIALS IN THE COMMERCIAL COURSES

A. *Classroom Objectives*

The range of topics to be included within any curricular offering⁴ depends, of course, on the defined educational objective.⁵ The commercial law novice normally comes to the course with some academic training in Contracts, and often Property as well. Starting there, the function of the course in Commercial Law should be to further the

¹ Professor of Law, Yale Law School.

² Reference is made to the curricular announcements of the various law schools. A relatively large sampling of the 1970-71 bulletins shows that the semester hours devoted to courses arguably within the ambit of "Commercial Transactions" varies from four to over fifteen; the descriptions run from "A Study of the Uniform Commercial Code" to enviable long paragraphs of included topics. Products Liability is rarely excised for separate course treatment; "consumerism" is somewhat oftener. While it is difficult to glean from this literature whether realty mortgages and land finance are covered more in the basic property courses than elsewhere, it is unlikely that a four or six semester-hour course in Commercial Transactions described as a study of various articles of the U.C.C. includes an integration of those or similar matters.

A more comprehensive survey appears in Del Duca, *Continuing Evaluation of Law School Curricula—An Initial Survey*, 20 J. Legal Ed. 309, 317-33 (1968), but without detailed descriptions of course contents.

³ Such an approach is intended to avoid the pitfalls discussed in Parker, *A Field Guide to Book Reviewing*, 20 J. Legal Ed. 169 (1968).

⁴ My concern here is primarily with the choices of included topics and their presentation within teaching materials, rather than with the more protracted issues of curricular attitude. For discussions of the latter see, for example, Note, *Legal Theory and Legal Education*, 79 Yale L.J. 1153 (1970); Savoy, *Toward a New Politics of Legal Education*, 79 Yale L.J. 444 (1970).

⁵ Since the criteria for inclusion and exclusion may thus vary significantly, the purpose of the classification must be kept in mind. What the statutes or digests may lump together may—for purposes of instruction—best be considered asunder: "There may well be a distinction between classification for a code, for practical treatises, for academic instruction, and for a treatise on jurisprudence." 5 R. Pound, *Jurisprudence* 72 (1959).

development of the student's ability to anticipate, recognize, and resolve the legal problems relative to the distribution of goods and services in the American economy. This suggests at least some irreducible elements: Sales, Security, Distribution and Payment.

A further qualification, dictated by such practical matters as available time, is that of generality. To avoid engulfing an entire curriculum with this one course or sequence of courses, special problems of regulated or concentrated industries must be afforded separate elective treatment to the extent that they do not partake of the legal elements common to the bulk of commercial enterprises. For similar reasons, questions involving the form of business organization may be excised, except as they may be dictated by (or may dictate) the manner of executing the commercial purposes of the firm. A few exceptions do exist to the general rule that problems relating to distribution of goods and services are not significantly altered by the choice of incorporation over proprietorship or partnership. In short, the course should include discussion of primarily the private law⁶ aspects of Sales, Security, Payment and Distribution of goods and services.⁷

Viewing these subjects in their component parts gives the following list:

- (1) *Sales*: Creation, performance and remedies for breach of the contract of sale; quality and delivery requirements.
- (2) *Security*: Security interests in personal property; suretyship; remedies in bankruptcy; unsecured credit; reclamation of goods; realty security as a production financing device.
- (3) *Payment*: Negotiable Instruments, Bank Collections

⁶ The private versus public law choice has been noted elsewhere: MacLachlan, *Commercial Law As an Academic Subject*, 66 *Com. L. J.* 69, 69-70 (1961). MacLachlan's point of view, however, if taken to its extreme, ignores important facets of the final step in the distributive chain—the consumer. Public law here looms large.

⁷ Or, primarily Articles 2 (Sales), 3 (Commercial Paper), 7 (Documents of Title), and 9 (Secured Transactions) of the Uniform Commercial Code. [hereinafter, U.C.C. citations are to sections of the 1962 uniform text.] That this is true is hardly surprising: "[T]his code . . . attempts to collect in one place most of the legal rules regulating the sale and distribution of goods and the collection of the price. . . ." Dunham, *The New Commercial Code* (remarks delivered to the Commercial Law League of America), 55 *Com. L. J.* 197 (1950).

In fairness, Pound's caveat bears citing:

In particular, it would be most unfortunate to set up a category of commercial law in a classification of the common law. Such may be one effect of the Uniform Commercial Code In such a course there is likely to be consolidated what had been taught as distinct courses in one heterogeneous artificial course [The U.C.C.] cuts across many subjects in the law, with no common principle to hold the selected revered [sic] parts together.

5 R. Pound, *supra* note 5, at 73-74, 74 n.109. Pound's classificatory criteria look to history, tradition, logic and analogy but they do not include professional utility or frequency and degree of interaction among severable topics. Cf. Friedman, *Contract Law and Contract Research*, 20 *J. Legal Ed.* 452-53 (1968).

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and Deposits; Letters of Credit; Credit Cards; Consumer Credit.

- (4) *Distribution*: Documents of Title; Contracts of Carriage and of Bailment; Franchise Agreements; Distributorships and Dealerships.

Additionally, brief excursions into agency,⁸ commercial insurance,⁹ and corporate finance¹⁰ may be undertaken when necessary to amplify the central headings, or at least to remind the student that "Commercial Law" is often only a part of effective business counseling. Selected topics in bankruptcy and consumer credit, both of which are often taught in separate courses, must also be introduced: the former for the simple reason that no discussion of security is sensible without a consideration of its durability in insolvency proceedings;¹¹ the latter because of its astounding growth, size, and importance.¹²

While the treatment of these related matters could vary substantially, the course should not be lured into the comfortable trap of focusing exclusively on the Uniform Commercial Code. The U.C.C.—as compared to certain of the commercial codes of the civilian tradition—"is at best only a partial and limited codification."¹³ Even some areas *within* the Code's ostensible jurisdiction are often governed by preemptive federal legislation,¹⁴ or by reference to extra-Code statutes and decisions.¹⁵

⁸ See U.C.C. § 1-103: "Unless displaced by the particular provisions of this Act . . . the law relative to . . . principal and agent . . . shall supplement its provisions." See also §§ 3-403, 4-201.

⁹ For example, see U.C.C. § 2-510(2),(3) (location of "Risk of Loss").

¹⁰ Students and instructors of Commercial Law (although perhaps not practicing lawyers) have, in my view, traditionally ignored the extent to which financing decisions (buying on credit, factoring accounts receivable, issuing short term promissory notes, or drawing on secured lines of credit) can affect the financial structure of the firm, and hence its profitability to the owners, as well as its position in the capital markets. While I do not suggest that a tour de force in corporate finance be given with every course in commercial law, this is one point at which some awareness of the interdependence of the two "disciplines" would be helpful.

¹¹ MacLachlan, *supra* note 6, at 72.

¹² While Braucher predicts that consumer credit law will disappear from the commercial law curriculum—as, he says, did Products Liability from Torts—to become a part of public law studies, Warren disagrees. In Warren's view, enactment of the Consumer Credit Protection Act of 1968 (15 U.S.C. §§ 1671-77 (1970)) and of the Uniform Consumer Credit Code will make the study of a "national" consumer credit law more facile within the commercial law courses. See Roundtable on Commercial Law, 22 J. Legal Ed. 331, 336, 337-38 (1970). See also the remarks of Egon Guttman. *Id.* at 357. Whether or not Consumer Credit is given separate course treatment, the status of "consumerism" does deserve mention at any point in the Commercial Law courses where it is significantly different in legal effect from the merchant-to-merchant nexus.

¹³ Remarks of Professor Rodolfo Batiza, Roundtable on Commercial Law, 22 J. Legal Ed. 331, 347 (1970).

¹⁴ For example, the Federal Bills of Lading Act, 49 U.S.C. §§ 81-124 (1970); Bankruptcy Act, 11 U.S.C. §§ 1 et. seq. (1970); Federal Tax Lien Statutes, Int. Rev. Code of 1954, §§ 6321-6323; National Validation of Security Interests in Motor Carriers, 49 U.S.C. § 313 (1970); Perishable Agricultural Commodities Act, 7 U.S.C. § 499 (1970).

¹⁵ For example, U.C.C. §§ 2-402(2) ("fraudulent under any rule of law"), 9-310

Whatever topics are chosen, imparting doctrinal expertise in a second- or third-year law school class is never sufficient, and usually not possible, without simultaneously educating the class in legal *method*. Memorization of rule, counterrule, and exception without an appreciation of the system in which the rules operate, and of the policy referents which dictate choices among competing alternatives, does not equip the student to counsel effectively the commercial client's affairs. Lawyering involves the making of vital choices and predictions. The student who sees law not as process but as a collection of rules will be ill-equipped to act when goods must be moved and no "horn-book" formula exactly fits.¹⁶ At such a point, a reasoned and realistic *analysis* of the alternative courses of action, and a prediction about their outcomes, must be made—often with little time to search through even scant precedent.

In Commercial Law, even the usual tools of legal analysis are often not enough. Typically, the student is for the first time being exposed to a field of law largely statutory in its coverage and, what is worse, to a *code*. The legal method of the Anglo-American common law has, in some very important respects, been displaced by the "Lex Llewellyn,"¹⁷ not only by the particular characteristics¹⁸ of the U.C.C., but by the very nature of a code:

A "*code*" is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body revealing its own plan and *containing its own methodology*.

("unless the lien is statutory and the statute expressly provides otherwise"), 9-201(1) ("subject to any statute or decision which establishes a different rule . . ."). Compare also §§ 7-103, 1-103.

¹⁶ Vold, *Construing the Uniform Commercial Code: Its Own Twin Keys: Uniformity and Growth*, 50 Cornell L.Q. 49, 56 (1964). Vold impliedly considers an appreciation of legal systems to be essential to commercial lawyering: "[To find the applicable rule] under the provisions of the Uniform Commercial Code . . . choose the provision (or interpretation based thereon) deemed most likely to achieve the purpose (or redress the mischief) toward which that provision of the Uniform Commercial Code was aimed. . . . Will this decision as a precedent help the useful process of . . . mov[ing] goods from original maker to final user? If so, this decision will prima facie tend toward greatest fulfillment of human wants with least practicable frustration of other human wants" *Id.*

Even the lawyer who does know his way around the commercial law "rules" can stub his toe very painfully when he takes, e.g., one section of the U.C.C. at purely face value. See pp. 196-98 *infra*, on Code methodology. Such slips are, unfortunately, occasionally made by the bench as well as the bar. See *National Shawmut Bank v. International Yarn Corp.*, 322 F. Supp. 116 (S.D.N.Y. 1970).

¹⁷ Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 Law & Contemp. Prob. 330, 333 (1951).

¹⁸ Or, unforgivable idiosyncracies. See Mellinkoff, *The Language of the Uniform Commercial Code*, 77 Yale L.J. 185 (1967).

It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered *in accordance with its own basic policies*.¹⁹

While the U.C.C. does not partake of this definition to the extent of being an entirely closed system, it does have its intrinsic methodology.²⁰ The use of case precedent in problems of Code interpretation differs from that in strictly common law controversies. Large areas are indeed left to case law evolution,²¹ but, generally speaking, the interstices in any given U.C.C. provision should not be filled exclusively by resorting to principles enshrined in the cases.²² The Code's own purposes, rather than just the accumulated wisdom of prior opinions, should be the primary source of guidance.²³ Partially because the U.C.C. was drafted in response to the obsolescence (by changed business practices, in many instances) of prior law,²⁴ "so far as possible the meaning of the law [should] be gathered from the [U.C.C.] itself, unfettered by anachronisms indigenous to the respective jurisdictions. . . ."²⁵

Furthermore, the U.C.C. contains its own "gap-fillers"²⁶—residual

¹⁹ Hawkland, Uniform Commercial "Code" Methodology, 1962 U. Ill. L.F. 291 (1962) (emphasis added) [hereinafter cited as Hawkland]. See U.C.C. § 1-102(1), (2).

²⁰ Hawkland, *supra* note 19, at 313-20.

²¹ For example, U.C.C. § 2-313, Comment 2: "the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. . . ." Section 1-103 states: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."

²² U.C.C. § 1-102, Comment 1: "It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However . . . [t]he Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question"

But see cases at note 25, and discussion of the commercial context at pp. 198-99 *infra*.

²³ See Hawkland, Article 9 Methodology, 9 Wayne L. Rev. 531, 534 (1963), 1 U.C.C. Rep. Serv. 815, 819. It is, of course, unwise to be categorical about such a proposition. As Mueller has pointed out, a law teacher, to be useful, must be a legal realist as well as a legal philosopher. Discussions of what courts *do* should not be omitted for the sake of elucidating what they *should* do. See Mueller, Contract Remedies, Business Facts and Legal Fantasy, 20 J. Legal Ed. 469, 471 (1968). See also cases at note 25, *infra*.

²⁴ Luther, The Commercial Code—What and Why, 36 Mass. L.Q. 24 (1951).

²⁵ *Lincoln Bond & Trust Co. v. Quenan*, 344 S.W.2d 383, 385 (Ky. 1961). Unfortunately, not all jurisdictions accept such a clean beginning. "[T]he Massachusetts court regards [the Code] less as a novel enactment than as largely a restatement and clarification of existing law" *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790, 792 (D. Mass. 1958). Other courts allow a mixture—the Code is exclusive, but prior cases not inconsistent with its provisions are controlling. *Herington Livestock Auction Co. v. Verschoor*, 179 N.W.2d 491, 495, — Iowa — (1970). Cf. also *In re Robertson*, 6 U.C.C. Rep. Serv. 266, 269 (Bankruptcy No. 26, 299, E.D. Tenn. 1969) with *General Electric Credit Corp. v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958, 963-964 (D. Ore. 1969).

²⁶ U.C.C. §§ 1-102(1), (2), 1-106. Cf. Vold, *supra* note 16, at 62 and Hawkland, *supra* note 19, at 303.

sections designed to avoid the academic unreality that any *seemingly* closed system invites.²⁷ To use such provisions properly is to understand the Code's internal methods of definition and qualification: it is not so much a function of doctrinal knowledge as it is of the techniques of search and synthesis.

Even these cursory observations on the internal method of the U.C.C. have significant implications for the choice of materials best used in the Commercial Law classroom. A series of cases, for example, illustrating the evolution of some concept over time may yet be necessary to demonstrate the historical dimensions of a given point, but it is no longer adequate to stop with the most recent decision on the subject. Teaching materials should be constructed so as to reveal history, evolution²⁸ and doctrine, as well as to present opportunities for exercising the methodological skills peculiar to, and necessary for, adequate facility with commercial law problems.

The teaching materials for commercial law must also convey to the student, if not a description of contemporary commercial practices, at least an awareness of the extreme importance of the business context. This is so for several reasons. First, devices such as after-acquired property financing, field warehousing and other like esoteric behaviors, as well as commercial documents such as letters of credit, trade acceptances, and bills of lading, cannot be appreciated—and the law relative to them understood—unless they are introduced with some explanation of their commercial utility. Second, appreciation of the “demonstrable realities” of a transaction is crucial to the resolution of commercial disputes²⁹ even in nonlitigious arenas. Finally, the U.C.C. eschews “solving puzzles in dead languages,” but instead

seeks to reinstate the merchant as the main arbiter of commercial law; its golden age is the age of Lord Mansfield and his merchantmen juries. . . .

Without a formal panel of merchants, the Code nonetheless insists that objectified commercial practice is the norm of decision in commercial cases[;] the judge acts as a wise, open-minded arbiter, and sifter of the evidence on custom.³⁰

²⁷ Hawkland refers to the following as “supereminent provisions”: U.C.C. §§ 1-203, 1-204, 2-302, 2-716(1), 3-511(1), 4-103(2), 8-406, 9-207. Hawkland, *supra* note 19, at 305.

²⁸ See, MacLachlan, *supra* note 6, at 71: “[The Code] can be best understood only in its background. . . . [T]reating the Code as if it came from another planet on some date in the 1950's is complete nonsense.”

²⁹ Peters, Remedies For Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Road Map for Article Two, 73 Yale L.J. 199, 201-02 (1963).

³⁰ Friedman, Contract Law and Contract Research, Part I, 20 J. Legal Ed. 452, 456 (1968). Compare Kripke, The Principles Underlying the Drafting of the Uniform Commercial Code, 1962 U. Ill. L.F. 321, 331, with Countryman, Commercial Law, 47 Texas L. Rev. 1003-04 (1969). The latter (quoting J. Frank, American Law: The Case for Radical Reform (1968), as to § 2-302) states: “[T]here may be arguments for or

The commercial lawyer in his role of planner, problem solver and advocate must be acutely aware of business contexts³¹ and practices; and the commercial law teacher must carefully select his materials to serve this need.³²

B. Materials: Cases, Problems and Text

The actual selection of materials is much more difficult than loosely describing the criteria for inclusion or exclusion, partially because varying pedagogical attitudes are more comfortably linked with disparate types of materials. Nevertheless, certain parameters are apparent.

against a contract provision which arises from the facts of the trade of which the court, unless instructed, would be ignorant."

³¹ Most notable among U.C.C. sections which incorporate such factors is § 1-205: Section 1-205. Course of Dealing and Usage of Trade

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

The potential utility to the lawyer of such a provision is difficult to overemphasize. One excellent analysis is that by Carroll, *Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; Or Searching for More Expansion Joins in Karl's Crumbling Cathedral*, 12 B.C. Ind. & Com. L. Rev. 139 (1970).

The U.C.C. literally abounds with similar opportunities. See, for example, §§ 2-609 (1), (2), 3-304(1)(a), *inter alia*.

³² There is at least a fourth reason, i.e., that commercial disputes are very frequently settled without reference to the contract or to potential or actual legal sanctions. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Amer. Soc. Rev. 55, 61 (1963). Note also the colloquy between Morris and Kevin in *Leff, Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 Yale L.J. 1, 25-26 (1970).

This lack of reliance on *contract law* in the behavior of commercial men exists at the planning stage as well as the resolution stage. See Macaulay, *supra*, at 57-58, 61, 63-66.

For several reasons some introductory *text* on commercial practices, including prototypal transactions and sample forms of commercial documents, is highly desirable.³³ In many areas of contemporary commercial law, especially some within the peculiar ambit of the U.C.C., reported opinions of adequate significance and lucidity are less than abundant. Even though U.C.C. methodology can very often be well explored by running a pre-Code case through the Code's "plumbing," some balance between historical perspective and contemporary practice must be struck. The Code's reliance on actual business practices as the norm demands a familiarity from students often not possible to attain solely from a study of available appellate opinions. First, an *appellate* case is an extraordinary event in nonconsumer commerce, and to a lesser extent, in consumer affairs as well. It is atypical, often the result of a deviation from established practices. Second, and to the extent to which such materials can be used to extrapolate present commercial behavior, the vintage must be carefully controlled.

Exclusive reliance on cases—in the classroom if not in the prepared materials—poses other dangers as well. In this field of law especially, effective counseling (as well as drafting, negotiating and arbitrating) requires that the attorney be aware of the reality that "commercial law" problems often include significant nonlegal or quasi-legal factors.³⁴ The usual case method often insulates the student from this awareness. In addition, while the relative instructional emphasis between the questions "What-should-the-lawyer-do," and "What-should-the-court-hold" is a largely personal matter, the straight appellate case method alone seems inefficient to pursue the former very far.³⁵

Retaining the case method as the *core* of legal education in this field as well as others, however, does have its advantages:

The student keeps his feet on the ground, distrusts

³³ In response to those who may think that extensive note materials make learning too easy, I can do no better than quote the following: "[N]otes try to do a job similar to that of Sherpa bearers in an Everest expedition; good help at the outset merely gets one more quickly to the toughest parts of the climb." J. Honnold, *Law of Sales and Sales Financing* xii (3d ed. 1967). Compare also Davis' view that "[t]he notion that textwriting is not for training the mind but is only for informing the mind is a misunderstanding, and a thoroughly pernicious one." Davis, *The Text-Problem Form of the Case Method as a Means of Mind Training for Advanced Law Students*, 12 J. Legal Ed. 543, 545 (1960). [Reprinted from K. Davis, *Administrative Law Cases, Text and Problems* (1960).]

³⁴ Yegge, *The Future Legal Practitioner in the United States: What Training He Must Receive* (AALS Curriculum Committee Proceedings, 1967), 44 Denv. L.J. 12, 21-22 (1967).

³⁵ Davis, *supra* note 33, at 545. In Davis' view, the straight case method examines law in the context of the appeal—it tends to be critical (and thus negative), seldom creative (and thus affirmative), and its focus is narrowing, rather than broadening. *Id.* at 546. In addition, its focus has its good *and* bad points.

generalizations and abstractions, appreciates the importance of application of principle, considers facts of cases as well as ideas and problems, participates in thinking that contributes to solutions, and prepares his own generalizations. . . .³⁶

Ideally, a set of prepared teaching materials should include various types of material, each with its purpose. Doctrine, methods, policy, history and process are each best illustrated and learned in differing fashions. Monolithic materials often cannot avoid elevating one at the expense of another.

C. Organization

Beyond considerations of the types of teaching materials, but at least of equal importance, is the ordering of the constellation of topics included within the course(s) in Commercial Law.³⁷ Few instructors, I suspect, are immune to nagging questions such as: "Why (not) a separate course in Negotiable Instruments?" Such inquiries (or self-doubts) refer not only to the *selection* of topics covered within any discrete "course," but also, interdependently, to the *relationships* among the included subjects. The former is dictated most commonly by curricular pressures,³⁸ although there is little uniformity among the several law schools as to *where* the suggested topics are to be placed in the curriculum.³⁹ The latter may be the area wherein the individual instructor typically has the widest latitude.

Total separation of Sales, Security, Distribution and Payment—which is how it used to be in the "Old Days," I am told—seems to me a patently bad idea. Presenting "a series of unrelated flashes of brilliance" is, according to Gilmore,⁴⁰ equivalent to treating "[e]ach new case or group of cases [as] a surprise package whose relationship to what went before and came after . . . [is] an impenetrable mystery." On the other hand, totally integrating all the diversified parts of the system fails to give the student any point of beginning; a spiral is always easier to approach than a series of increasingly larger concentric circles.

One integration pattern which appears, on balance, to have much in its favor is termed "transaction-oriented." Not only does it provide the context into which the various elements may be positioned and appreciated, it also tends to bridge the gap from academic aridity to

³⁶ Davis, *supra* note 33, at 543-44.

³⁷ See list at pp. 194-95 *supra*.

³⁸ An adequate package, I think, is one similar to that in effect at the University of Toledo: Introduction to Commercial Law (4 quarter hours); Advanced Commercial Transaction I (3 hours); and Advanced Commercial Transactions II (3 hours). Or, as one of my colleagues would have it: "Simple Transactions," "Difficult Transactions," and "Incredible Transactions."

³⁹ See note 2 *supra*.

⁴⁰ As quoted in the majority preface in R. Speidel, R. Summers and J. White, *Commercial Transactions* xii (1969).

a more nearly satisfactory balance of the philosophical and the practical, simply by always having available a ground upon which feet can from time to time be placed.⁴¹ Beginning with the sale, or more precisely, with the formation of the sale contract, the transaction orientation flows smoothly through analysis of the parties' respective obligations toward each other (including those of quality and delivery), into the schemes for remedying the breach of one or more of them, and on to the mechanisms for distribution. Problems in financing (both production⁴² and purchase) and in payment (instruments, documents, bank collection systems) complete the analysis of the flow of goods (and services) and the counterflow of payments.

Problems in melding the subject areas arise, however, when two or more sorts of devices are operating simultaneously. Students have, for example, avoidable difficulty in appreciating transactions involving "sight draft against bill of lading" if they begin discussing documents of title without some prior understanding of negotiable instruments. Similarly, field warehousing, or any similar type of commodity paper financing, partakes of Documents and of Security simultaneously.⁴³ An extended digression into, say, all of Article 7 or Article 3 for the sole purpose of rounding out a discussion of the Article 2 obligations is enormously disruptive in the transaction-context course, yet some mention of interaction is mandatory. Here the selection of materials may be crucial. A case or two on negotiability—or perhaps a bit of well written text—inserted into the Sales materials at the proper time may do much to illuminate the relationship among the topics in a thoroughly realistic way, and still save other commercial paper problems for treatment at a more propitious time. In response to the question concerning where in the commercial law course Article 3 is covered, the answer might well be: "Wherever relevant."⁴⁴

⁴¹ The idea is hardly new, at least from this writer's vantage point. See generally Shestack, *Another Look at Commercial Law Instruction*, 2 J. Legal Ed. 466 (1950).

⁴² "Financing production" is the one element most amenable to separate treatment, either as a major digression from security (including suretyship) in general, or later on, when it can be combined with financing through the issuance of various types of money and commodity paper, and—depending upon curricular pressures—with the uses of real estate security. But any point at which it becomes relevant is the point at which a fleeting excursion into corporate finance should be taken, if for no other reason than to assist the student in simultaneously integrating *several* major fields in his own mind during his student career.

⁴³ A similar problem exists, although far more readily soluble, in overlapping concepts. The indicia of negotiability and its consequences may vary from Article 3 to Article 7, but there are enough similarities to make severing the common elements worthwhile.

⁴⁴ The retort is intended to be exemplary only; it is not limited to Article 3, although that body of law is more apparently susceptible to such treatment than some others. While it is also true that Negotiable Instruments is a "code within a code," it is *not* necessary to sacrifice examination of that phenomenon by treating the topic "wherever relevant."

II. AN EVALUATION

In using the foregoing thoughts as criteria by which to evaluate Professor Peters' new offering, the following caveat should perhaps be noted. It is quite tenable to assert that a casebook is a resource, and that, if it contains all the materials one could ask for, the editor should not be blamed for choosing an orientation quite different from the one this reviewer suggests. After all, the instructor should be capable of piecing a course together himself. Very few, I suppose, slavishly begin at page one and follow the path without wandering. Furthermore, assigned reading outside the covers of the text is still considered fair game. However, if what has been said so far about topics, text, cases, and organization has any merit, then the structure of the book and the focus of the editorial comments may be significant. This is especially so if the student is expected to garner a good deal of education outside the classroom by working through series of problems to develop points made by the principal cases and the instructor.

At the time of this writing the book⁴⁵ has not been available for testing in the classroom. The following evaluation, therefore, is based upon a reading of the cases and text, and upon a working-through of numerous textual questions and problems. Evaluating classroom materials in such a context does have its inherent flaws; but, by analyzing this book in light of the thoughts developed in preceding pages, some worthwhile comments should be possible.

A. The Boundaries: Topics, Method, and Context

The broad coverage of "Contracts Dealing with Personality, Realty and Services" indicated in the book's title is as well intentioned as it is accomplished. First, according to Professor Peters, "[t]his expanded coverage mirrors the range and diversity of those recurrent, non-donative, non-familial relationships which can be denominated mercantile or commercial contracts. . . . A general exploration of the many mercantile contracts with which the Code deals only in part . . . provides a more total picture of the law of commercial transactions."⁴⁶ Second, but at least equally important, "a proper grasp of the precise impact of the Code on particular transactions [is] enormously enriched by a consideration of alternate policies which govern non-Code transactions."⁴⁷ Perhaps because the materials do generally fulfill these

⁴⁵ The copy used for this review was a collection of page-proofs, courtesy of Mr. James Gillespie of the Bobbs-Merrill Company. Because not all of the major and minor topic headings had been finally established in these proofs, I refrain from commenting on such matters here. Hereinafter the casebook will be cited as Peters.

There is an additional item which ought to be disclosed. My initial education in Commercial Law was largely at Professor Peters' hand, and it included the study of portions of these materials in their prepublication draft form. While this has given me some feel for the text from the students' point of view, it is occasionally difficult for me to assess where in my approach to the subject Professor Peters' bias ends and my own begins.

⁴⁶ Peters at v.

⁴⁷ Id. at vi.

objectives, the text does not often impose topical limitations upon those using it.

The Sales materials, for example, provide ample coverage of performance and remedies for breach of contracts relating to realty and services, as well as goods. Brief analyses of arbitration and the impact of commercial insurance are smoothly integrated into the mainstream of the text.⁴⁸ Quality⁴⁹ and delivery requirements are exceptionally well treated. The one omission⁵⁰ is, I think, forgivable: Professor Peters has chosen to treat the Code's rules on contract formation with a single swift stroke,⁵¹ apparently on the assumption that such things are (or should be) covered in the basic Contracts course. To what extent that assumption is true is, of course, nearly impossible to determine. However, because issues in parol evidence, modifications, and waivers do arise in regard to the contract of sale,⁵² the investment of a small amount of time in such things—even at the risk of repeating the already-learned—is probably worthwhile; a recent case or two to help that process would have been appreciated.

The chapters on Security are at least as thorough⁵³ as those on Sales. All of the usual, but indispensable, topics (creation, validation, perfection, enforcement, priorities, and liquidation) are here, with a healthy dose of bankruptcy throughout. There are, in addition, discussions of real estate security, multistate transactions, title certificate acts, bulk sales and tax liens, plus a long section on debtor's defenses.⁵⁴ It is with respect to the latter that one criticism could be made: the materials on consumer protection are occasionally incomplete,⁵⁵ although arguably sufficient for a course in which the focus is the entire distributive chain rather than merely its presently most popular part.

⁴⁸ One minor qualification is that additional text on the *scope* and *nature* of commercial insurance would be helpful.

⁴⁹ The warranty section is notable in particular, although the materials on realty are a bit lengthy. *Id.* at 297-344. The chattel warranty cases (*Henningsen*, *Kollsman Instrument Corp.*, *Seely*, and *Neville v. Union Carbide*) will integrate the warranty materials with the preceding discussions on damages. Following two notes (*Privity* and *Disclaimers*) is a selection of tobacco and drug cases. See Peters at 344-534.

⁵⁰ See discussion of topics at pp. 193-95 *supra*.

⁵¹ Peters, at 2: "The Code on the one hand broadly incorporates consistent principles of general contract law, in Section 1-103, while on the other hand it establishes specific contract rules on such general subjects as offer and acceptance, and unconscionability, in Sections 2-201—210 and Sections 2-301 and 2-302." Cf. note 52 *infra*.

⁵² At such points Professor Peters does mention these issues, but usually in very abbreviated fashion. E.g., Peters at 445 (re express disclaimers of warranty): "All of this requires a determination of when the sale was in fact made, often an intrinsically difficult inquiry whose complexities are only increased by U.C.C. §§ 2-207 to 2-209." See also, *id.* at 37 ("[t]here are, of course, waiver sections. . ."), 444, 524.

⁵³ Again, by reference to the preceding discussion, at p. 194 *supra*.

⁵⁴ Peters at 1177-1284. But see note 55 *infra*.

⁵⁵ While the Massachusetts Consumer Finance statutes are reprinted in 30 pages (1249-78), in the same section the U.C.C. is accorded 2 pages, the NCA none, and the

The Payment materials include,⁵⁶ in addition to the "normal" contractual obligations of payment, an extended treatment of bankers' commercial credits⁵⁷ and documentary transactions, and notes on the relationship between payment methods and inspection rights. The materials for those particular items are ample, although the instructor who feels the need to incorporate a study of credit cards and other noncash payment systems will need to do a bit of supplementing.

Two obvious exclusions⁵⁸ here are Negotiable Instruments and Bank Deposits and Collections. The use of the word "exclusions" needs some qualification; while features of negotiable instruments law are interspersed throughout the book to "round out" discussions of payment and financing, for example, the bulk of the material is collected in a forty-one page "Negotiable Instruments Primer."⁵⁹ In this cogently written mini-hornbook is contained text designed to arm the student for his joust with the balance of the materials; but as Professor Peters notes, "it will not, of course, be a substitute for a full-scale course in negotiable instruments, and will hardly touch on the complexities of banking law. . . ."⁶⁰

It is with this objective, more so than with the materials themselves, that one could take issue. Why, after considering instruments in their functional context, any "full-scale course" should be necessary, I do not understand. There may be peculiarities in the world of bills and notes worthy of further treatment; but if their operation *in situ* is adequately explored, justification of an additional, separate course is doubtful. Short-term commercial paper, after all, is merely a means by which the ends of financing and payment are accomplished. If enough is studied to demonstrate how those tasks are performed, there

Federal Consumer Protection Act 4. *Id.* at 1248 et seq. The bibliography, however, is, as elsewhere in the book, excellent. *Id.* at 1283-84, 1245-49.

A similar comment could be made about "unconscionability." It is dealt with primarily in the financing context. *Id.* at 1189 (In re Elkins-Dell Mfg. Co., defenses to the secured transaction), and 1299 (Williams v. Walker-Thomas, re repossessions). But it is left dangerously open-ended at several other points, e.g., at 1205. The discussion of § 2-302 as a limit on credit costs is appropriate at that point, but unfortunately brief. Students who have not been forced to analyze § 2-302 rigorously often tend to clutch it with a panacean grasp. Further textual development could prevent such a potential diversion. The instructor who prefers to take his § 2-302 in larger doses could easily add to these cases the discussion of the warranty materials, especially the *Henningsen* case, at 353, and *Campbell Soup Co. v. Wentz*, at 67.

⁵⁶ Peters, Chapter 3: "The Obligations of the Vendee for Payment," at 595-733. The chapter begins with three sections on "The Normal Incidence of the Obligation to Pay," "Contractual Modifications," and "Excused Nonpayment."

⁵⁷ *Id.* at 670-734.

⁵⁸ See discussion of topics, at pp. 194-95 *supra*.

⁵⁹ Peters at 1411-51. The introduction to the Primer states, "[t]he purpose of this chapter is to provide basic information about negotiable instruments for students of commercial law. The chapter is designed as an introduction into the terminology, methodology and mystique of the law of . . . 'instruments' It should enable you to understand the negotiable paper counterparts to the variety of commercial transactions discussed elsewhere in this casebook." *Id.* at 1411.

⁶⁰ *Id.*

would seem to be little else to say. Professor Peters has chosen here a middle road between fully integrating and totally segregating this important area. As a result, the student *could* possibly fail to fully appreciate the workings of the Article 3 machinery, thus not totally understanding its function in context. The high quality of the "Primer" will remedy a good deal of this, but the instructor who chooses to completely integrate his courses should be prepared to make more extended in-class digressions into Negotiable Instruments than the notes in the remainder of the casebook would suggest.⁶¹

Topics in Distribution, including documentary deals (contracts of carriage and of bailment), are covered "wherever relevant,"⁶² and quite well at that. That is not, however, the case as regards dealerships and franchise arrangements. At least some mention of the latter should be made in the basic commercial law course, for several reasons. First is the magnitude of the share of commerce currently being done by franchise networks.⁶³ Secondly, and although much of the current discussion in franchising is concerned with Antitrust and Securities Regulation, a franchise contract will typically moot a good deal of the U.C.C. scheme; the same is true of other types of dealership arrangements.⁶⁴ Franchising is one of those areas in which the form of the enterprise does affect what may be nominally called the "commercial transaction."

As have many of her predecessors, Professor Peters has left much of commercial law method for tacit development. Five and one-

⁶¹ There is no similar replacement for the nearly total—but more justifiable—exclusion of bank deposits and collections. Supplementary materials in this area are readily available. See, e.g., B. Clark and A. Squillante, *The Law of Bank Deposits, Collections, and Credit Cards* (1970).

⁶² As, for example, with respect to delivery requirements, see Peters at 589-94; payment, at 670; reclamation of goods, at 810-18; and security, at 870-92.

⁶³ See, Axelrad, *Franchising—Changing Legal Skirmish Lines or Armageddon?* Some Observations from the Foxhole, 26 Bus. Lawyer 695 (1971): "The growth in revenues attributed to this form of distribution has increased by 3600% in the past 15 years." *Id.* at 695. Currently, franchising accounts for over \$100 billion in retail sales annually, or marketing control over approximately 10% of the Gross National Product. U.S. Commerce Department News, Jan. 31, 1970 (address by Assistant Secretary of Commerce Kenneth N. Davis); see also, *The Impact of Franchising on Small Business*, Hearings before the Subcomm. on Urban and Rural Economic Development of the Senate Select Comm. on Small Business, 91st Cong., 2d Sess., (1970). While covering franchising in a separate seminar in the curriculum may some day come to pass, at present the commercial law courses seem well adapted to at least introducing the student to a phenomenon which

appears to be growing at an almost unbelievable rate. It has been called a cradle-to-the-grave industry. I have found that you can literally outfit your baby or buy a coffin at a franchised outlet. You can rent a snowplow, buy a bridal gown, get fitted for a bra, or hire a private detective from your 'neighborhood franchisee.'

Id. at 1 (remarks of Senator Harrison A. Williams, Jr.).

⁶⁴ Professor Peters' materials do cover modification of remedy by contract generally, Peters at 230-96, but they do not adequately treat the special problems in this increasingly important segment of trade.

half pages constitute the only express treatments of commercial history and methodology.⁶⁵ Yet, this is not to say that such a choice is necessarily in error. The instructor who carefully works his class through the one illustrative problem⁶⁶ will have at least alerted his charges to the fact that there is such a thing as code analysis; if he keeps at it throughout the first course in commercial law he will probably have accomplished a good deal. While I personally would prefer to have seen a more extended discussion of commercial law history, and especially of code and statutory interpretation, I have to agree that at least the latter can be well taught by running pre-Code cases through the statutory maze, or by in-class discussion of hypothetical problems designed to expose the U.C.C.'s crevices.⁶⁷ This more-or-less tacit development of analytical skill seems especially fruitful with respect to the integration of extra-Code law into the statutory scheme.⁶⁸ At junctures where opportunities for such discussion are not inherent within the topic, Professor Peters has artfully created them.⁶⁹ The result, of course, is that those who prefer teaching analytical method inductively may continue to do so; those who do not may expressly interject these considerations in class. Perhaps the only advantage to a more explicit coverage of method in the casebook, including the uses of non-Code matter, is to impress the student with its importance—a task probably as readily accomplished during class time.

I am somewhat less sanguine about the relative omission of "gap-fillers"—the residual or "supereminent" provisions which can form so integral a part of commercial lawyering.⁷⁰ Discussion of U.C.C. Section 1-205, for example, is limited to one brief reference in the *Negotiable Instruments Primer*,⁷¹ and commercial "good faith" is explored only tangentially in all but one instance.⁷² Certainly the juridical importance of these concepts (both theoretically and pragmatically) justifies a deeper probing; law-predicting without an appreciation of the nature of these flexion joints is simply too risky.

⁶⁵ Id. at 1-6.

⁶⁶ Actually, the problem is a series of questions concerning the Statute of Frauds, which illustrates the need for constant cross-referencing and precise statutory reading as well as the Code's gaps and ambiguities. Id. at 5-6.

⁶⁷ See text at p. 200 *supra*.

⁶⁸ A sampling could include: the relationship between the U.C.C. sections on warranty and the larger world of Tort. Peters, at 477, 511, 523; also Peters at 527 on the meaning of "defective" mechanics' and artisans' liens, id. at 1341, 1352, and title certificate acts, id. at 862-70, 1014.

⁶⁹ See, for example, the materials on Letters of Credit, 730-33, and Documents of Title, 870-88. The references, however, are not *always* self-instructive; in-class guidance seems to have been intended at a few points. See Chapter 3, § B, especially at 638; compare pages 39-43.

⁷⁰ See text at pp. 197-98 *supra*.

⁷¹ Peters at 1443.

⁷² A series of five problems are cited in the section on competing claimants. Id. at 765. The same is true of § 1-102(2)(b), noted only by way of footnote to a principal case. Id. at 712.

That most of the analytical considerations are adequately treated is the result of Professor Peters' truly first-rate handling of cases, problems, and text.⁷³ Those few areas which could have stood further development can be traced to the book's relative deemphasis of the commercial context.

The treatment of the business context is not uniform throughout the book. At some points there is explanatory material,⁷⁴ but at others these items are left to extrapolation from the principal cases.⁷⁵ This involves a degree of risk that coverage will be a hit-or-miss affair; and, in fact, there are a few instances where a "miss" occurs.⁷⁶ Having correctly decided that text-writing and spoon-feeding are not synonymous, it is surprising that the author did not everywhere expand the notes to include discussion of these rather important⁷⁷ matters. The inclusion of a few forms or several more prototypes could have aided "cognitive level" comprehension without compromising other objectives.⁷⁸

In this respect, the book is subject to two criticisms. First, the deemphasis of the commercial context leads to the relative elision⁷⁹ of one segment of the U.C.C.'s internal methodology, namely, the potentially valuable use of certain of the "supereminent" and interpretive provisions of the Code.⁸⁰ If it is true that objectified com-

⁷³ See discussion at pp. 209-11 *infra*.

⁷⁴ *Id.* at 132, 139. A case on the recovery of overhead as damages is followed by a rather good note on the business treatment of "accounting costs." *Id.* at 23 (factual background of principal case).

⁷⁵ Some of the principal cases do lend themselves to such extrapolations, e.g., *id.* at 237-46; others, much less so, *id.* at 1337-41. Certain portions of the *text* are similarly incomplete when it comes to integrating doctrine with mercantile exigencies. *Id.* at 267-75.

⁷⁶ An example is the treatment of bulk sales, *id.* at 898-903, 908-11. While the problems and text do an excellent job of introducing the statutory provisions, the task of exploring the commercial setting is left to one reported case, which, while it does discuss certain aspects of the business context, is extremely abbreviated and somewhat narrow for that purpose.

⁷⁷ See discussion of the significance of commercial context at pp. 198-99 *supra*.

⁷⁸ At some points the omission seems intentional, Professor Peters apparently opting in favor of the student's developing for himself the answer to such questions as "What are the commercial advantages and contra-indications to the use of X type of paper?" See, for instance, Peters, at 593-94: "Ordinarily the documents are tendered for acceptance and payment long before the goods could be expected to arrive. . . . This implies, of course, that the documents should be negotiable in form; *nonnegotiable documents are uninstitutional in this kind of contract, and create innumerable problems*" (emphasis added). The preceding materials (pages 589-593) do certainly "describe" the legal incidents of documents of title, but they explain the "why" of the underscored statement only to the student who carefully works his way through most of the prior code references, and who looks ahead to a couple of cases dealing with this matter (page 873). As a result, the conscientious student may attain an intellectual framework for understanding the quoted sentence, and that, it seems, was the author's purpose. My query is whether this acquired knowledge could not be made more apparent.

⁷⁹ Noted at p. 207 *supra*.

⁸⁰ Discussed at notes 26 and 27 *supra*.

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mercial practice becomes the norm of decision,⁸¹ then the importance of appreciating the "commercially usual" is difficult to overemphasize. The second point is considerably less important, and may only be a matter of pedagogical style: while explication of the business background is indeed *possible* within the covers of the book, it is not always apparent. The instructor who deems such matters important will have to devote some class time to setting the commercial stage.

B. *Materials: Cases, Problems and Text*

Organizing the materials in an eminently teachable fashion is without question the highlight of this book. It is, in fact, so well done that many of the criticisms previously mentioned are more easily repaired than would otherwise be possible. The system is used with minor variations from the first chapter to the next-to-last,⁸² with deviations from the pattern apparently dictated most often by the subject matter. An example or two should suffice to describe the structure.

In discussing the right of the buyer to refuse goods tendered him by the seller⁸³ (i.e., to "call the deal off"), the section begins with an extended quotation from Corbin on the relationships among restitution, rescission, and damages.⁸⁴ The apparent function here is to set the doctrinal and analytical background of the materials that follow, and to do so in sufficient breadth to provide a juridical context for those more particular issues. What follows are two pre-Code cases: the first⁸⁵ explores in greater detail a portion of the issues raised in the preceding note, and provides a factual setting for class discussion of the policy referents behind them. The second⁸⁶ is designed for a similar end, but is concerned with matters presently in the ambit of the commercial statutes. The factual setting of this second principle case is elaborated in a short note, including a sketch of the transaction from its beginning through to litigation. A Code case⁸⁷ of recent vintage (and of relatively frequent factual occurrence) then displays judicial application of the U.C.C. to several problems within the general subject.

Textual material by the author, liberally furnished with case and article citations, covers the historical development of the rejection rules from their judicial origins, through the Uniform Sales Act and into the numerous aspects of the twentieth century cases. Some of these cases are then considered in light of the contemporary statutes. The method here is to posit questions and make references to relevant sec-

⁸¹ See text p. 198 and notes 29-32 *supra*.

⁸² The final chapter comprises the "Negotiable Instruments Primer."

⁸³ Peters at 7-44.

⁸⁴ 5 A. Corbin, *Contracts* §§ 1104-06 (1951).

⁸⁵ *Village of Wells v. Layne-Minnesota Co.*, 240 Minn. 132, 60 N.W.2d 621 (1953).

⁸⁶ *Alper Blouse Co. v. E.E. Connor & Co.*, 2 N.Y.2d 281, 140 N.E.2d 358, 159 N.Y.S.2d 481 (1957).

⁸⁷ *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968).

tions of the U.C.C. The questions are sometimes those of decided cases and frequently are designed solely to introduce the careful reader to nuances of the statutory scheme. Comparisons with analogous rights of the seller, with installment contracts, and with non-U.C.C. transactions are handled in a similar fashion. Finally, a well-selected bibliography of supplemental reading is provided.

Common variations from this design include the substitution of early cases for text on the historical perspective,⁸⁸ or of more extended hypothetical situations to illuminate the statutory scheme.⁸⁹ Thus, with each segment of material the student is first introduced to the historical and doctrinal setting of the matters in point—a task normally best performed without the inevitable skewing which occurs when exclusive reliance is placed on appellate cases. Following the textual introduction, reported opinions are used to demonstrate to the student the need for reaching a decision, and to uncover the economic and societal referents which underlie both the broad legal context and the microcosmic process of decision-making. Through the inclusion of cases involving fact patterns governed by the commercial statutes, a critical evaluation of the U.C.C. scheme (and an appreciation derived from applying it to the case) is made possible. Additional “doctrine” as well as method is presented by Code cases.

Hypothetical problems, questions and references are used not merely to inform, but to aid the student in dealing with the statutes, evaluating alternatives and reaching conclusions.⁹⁰ To have employed reported opinions sufficient to encompass all the nuances of “doctrine” and analysis to which the student is exposed through these “notes” would have been to waste uncounted pages of text, to say nothing of time.⁹¹ Needless to say, the orchestration of the materials employed in the book successfully avoids the dangers of the monolithic approach

⁸⁸ E.g., the materials on risk of loss, Peters at 166 et seq.

⁸⁹ Id. at 97-98; cf. materials on quality requirements at 351-52, where the questions nearly form a practitioner's checklist. See also 670-733 on banker's credits.

⁹⁰ Some of the “problems” inevitably are better than others, although the quality overall is exceptionally high. Again, this may be only a matter of personal predilection. Occasionally questions are posed at a level which merely informs, rather than develops, analytical style. See Peters at 95. In other places, citations seem to be offered only as a resource; no spur to real study is presented. Id. at 178-79. Such occurrences are infrequent, and when they do appear the issues in question are more rigorously explored in other sections of the materials.

⁹¹ Again, at the risk of being unreasonably critical, I should add that there are places in the book where the balance of text and case is not perfect. Moore v. Bay (id. at 942) might have been relegated to text, for instance, while more case (or problem) material could have been added to the section on defective filings. Id. at 913-51. Similarly, the cases on Dominion at 1116-76 are too many except for the contribution they make to an understanding of business practices. On the other hand, too many issues in liquidation of the security interest are left to “note” treatment. Id. at 1331-36. Finally, the cases on chattel paper and dealer financing seem incomplete without some text on “floor-planning” systems, and perhaps a bit of history concerning trust receipts *at this point*. Id. at 1337-41.

already discussed.⁹² The background text serves to lead the student more quickly to the core of the issues in question, usually with some awareness of the factual context in which the problem arose. The note materials and their hypothetical questions plunge deeply, if on occasion tacitly, into policy, doctrine, and commercial law method. A basically chronological development illuminates not only the historical dimensions, but provides a sense of evolution—a picture of law as process. And, throughout, the abstract is made usable in the reported cases. While Professor Peters' system may not be fully self-teaching, even one teaching commercial law for the first time could not go far wrong by adhering to the pattern of this casebook.

C. Topical Orientation

By way of overview, the topical orientation of these materials is chameleon; it is as well suited to the transactional approach as it is to the functional or strictly topical methods. Throughout the book the central theme of distribution of goods is integrated with analagous issues in realty and services,⁹³ but in such a way as to preserve, rather than disrupt, continuity. There is no point at which the reader is without an appreciation of his place within the "flow" of commercial law.

The integration of Sales and Security, for example, is done in two ways, allowing the instructor a broad range of freedom to mesh these two major areas. At a few relevant points within the Sales materials are references to the security aspects of the transaction.⁹⁴ But the greatest bulk of the integration occurs in Chapter Four⁹⁵—a study of the need for secured transactions in the light of competing claims of ownership in sold goods. That chapter serves admirably the function of relating these two areas, and, for a nonintegrated course, it could be either the conclusion of the Sales Division, or the beginning of Security.⁹⁶

⁹² Whether Professor Peters arranged her materials to achieve objectives similar to those discussed elsewhere in this review, I cannot say. I comment on it here only to indicate how well the book accords with those criteria.

⁹³ See pp. 199-201 *supra*. See, for example, the section on quality obligations, Peters at 297-594.

⁹⁴ *Id.* at 273-75, 579, 594.

⁹⁵ *Id.* at 763-70, 820.

⁹⁶ For nonintegrated use, I would reverse § B ("The Continuing Rights of Prior Ownership Interests") and § A ("Competing Purchasers and Creditors") of Chapter 4, since the reclamation cases are more closely associated with the preceding materials on payment; looking first to the issues of seller or lender in possession is somewhat disruptive if only Chapters I through IV are being covered. The order is less important for the continuing course, since both financing aspects (purchases and production) are transactionally significant, and should—as they are in Chapters V through VII—be considered simultaneously.

As an aside, the inclusion of the *Kravitz* case at p. 829 of this chapter—while arguably appropriate—may have been forgone in favor of other uses of this delightful journey into statutory pathology. It could be better used in either Chapter 5 § A on bankruptcy, or very early on in the materials as an example of the U.C.C.'s interaction with other

On another plane, Professor Peters has managed to avoid the pitfalls of both superficial reference and disruptive digression, insofar as incorporating Negotiable Instruments and Documents of Title is concerned. Both types of commercial paper are considered whenever relevant,⁹⁷ the areas in which they overlap are not unnecessarily duplicated,⁹⁸ and their inclusion seldom requires excessive digression to make the point.⁹⁹ The salutary result is in part due to the Negotiable Instruments Primer, but equally to the level of craftsmanship with which Articles 3 and 7 are referenced into the mainstream of the book. Although tangential treatment of corporate finance is lacking, the integration of other matters peripheral to chattel security (but necessary for a complete picture of security transactions in general) is well done.¹⁰⁰ Finally, realistic use of text and copious questions and references to the U.C.C. all contribute to solving the problems which arise when simultaneous study of two "topics" is needed to appreciate a given point.¹⁰¹

While whatever predilections the instructor may have for organizing the multitopic course can find fulfillment here, the book is remarkably well suited to the "transactional"¹⁰² ordering in particular. In addition to fundamental matters such as the sequence of chapters and sections, the approach is largely a function of the material between the cases. The constant and close cross-referencing, and the use of "by the way . . ." notes and text introduce the proper elements at the proper moments without upsetting the overall current.

III. CONCLUSION

Within the pages of this book Professor Peters has set out but a brief sketch of the purposes she had in mind in producing it.¹⁰³ Measured in terms of those few statements, it is an unqualified success. The expanded coverage of transactions both within and beyond the reach of the U.C.C. is fashioned in a way nearly certain to pro-

bodies of law. But its present location is not harmful and the instructor could easily make these other connections without much difficulty.

⁹⁷ A brief check disclosed the following: *Documents*: Peters at 589-92 (delivery and payment); at 662, 732 (inspection rights, letters of credit); at 809, 818, 870-87, 891-92 (third party interests). *Instruments*: at 275 (modification of remedy, payment); 1213, 1217, 1221-22, 1245 (effects in security transactions); 584-85 (warranties of sale of "contract rights"); 652-57 (effect on breach, payment); 777, 818-19, 855 (competing claimants.)

⁹⁸ *Id.* at 818.

⁹⁹ Although, as noted at pp. 205-06 *supra*, more is bound to be required in some cases than the notes suggest.

¹⁰⁰ See, for example, the treatment of Bulk Sales at 898-91; Bailments at 870-88; Government Contracts at 971-73, 788-806; Bankruptcy throughout Chapters 5 and 6; "Consumerism" at 1229, *inter alia*; Suretyship at 798-806, 1357-62; and other competitors to the collateral at 1354-57.

¹⁰¹ See p. 202 *supra*.

¹⁰² See discussion at pp. 201-02 *supra*.

¹⁰³ See quotations from the Preface, and from the Introduction to the Negotiable Instruments Primer, cited at pp. 203, 205 *supra*, and at note 59 *supra*.

vide both a broad sweep of doctrine and an opportunity for critically assessing the policy choices of the Code. In addition, the text and notes on commercial paper are more than adequate to introduce the student to the "mystique" of the law of instruments.

The virtues of the book, however, go well beyond these expressed concerns. It is a resource every commercial law instructor would do well to consider—and to adopt. For even the fully integrated course or sequence, supplementing should be necessary only to flesh out bank collection systems,¹⁰⁴ or some recent "consumer" issues, if time allows.¹⁰⁵ Nothing need be added or changed so far as the use of cases, text and problems is concerned. While the question and problem materials occasionally seem too difficult to be self-teaching at the early stages, that may be a strength more than it is a weakness. A class that can be induced to give the notes the careful study they deserve will reap dividends well in excess of those attainable through less rigorous devices.

The few significant criticisms, I think, pertain to what the book could have included, rather than to what it does. I refer here to the treatment of commercial contexts and their implications for the techniques of commercial lawyering. There are, perhaps, two mitigating factors: one is that the instructor could himself supply such data at those few points where the text does not;¹⁰⁶ the other is that it is possible to extrapolate a good deal (but not always all) of the business setting from the principal cases. But in either event, some class time which could otherwise have been saved will have to be devoted to these matters. On the next level, this exclusion may make a thorough study of the impact of business practices on the lawyering process a bit more difficult, although I must admit that devotion of a not unreasonable amount of pedagogy—together with a well-used copy of the U.C.C.—could satisfy even the most avid student of Code method.

I have attempted to evaluate this book by comparing it to a rather specific and perhaps overly personalized set of standards. This type of evaluation has proved necessary in order to accomplish more than merely heaping praise on what is generally an excellent work. Statements such as "this part is good," or "that part is not so good,"

¹⁰⁴ The references to Article 4 (Peters at 584, 716-20, 732, passim within Chapter 8) do not portray the flow of payments through banking channels in a sufficiently inclusive manner. Professor Peters, of course, *never intended that they should*. There is, however, time in 100 class hours to complete the distributive system by taking up this topic.

¹⁰⁵ This is especially so in regard to credit cards. The other *topical* omissions (selected issues in corporate finance and commercial paper financing) could be treated without supplementary materials, although a pedantic impulse to the contrary may be more temptation than I can resist. Less impelling is the urge to distribute sample forms of documents, or to assign collateral readings in commercial law history, for here the case-book provides at least the openings for classroom presentation.

¹⁰⁶ Discussed at pp. 208-09 *supra*.

are based on those criteria; the instructor who disagrees with my premises should keep this fact in mind. Finally, if certain of my criticisms have seemed unduly querulous, this may only be due to the eagerness with which I met the publication of these materials. My anticipation has been justified. Ellen Peters' casebook is a profoundly valuable contribution to the teaching of Commercial Law.

EDWARD A. DAUER*

* A.B., Brown University, 1966; LL.B. Yale University, 1969; Assistant Professor of Law, University of Toledo College of Law.